

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES LAWRENCE PERKINS,

Defendant and Appellant.

A145448

(Mendocino County
Super. Ct. No. MCKUK-CRCR-13-
74210)

James Perkins was convicted of one count of aggravated assault after he attacked the victim upon discovering him in a hotel room with Perkins's wife. Perkins claims that his conviction must be reversed because (1) his trial counsel rendered ineffective assistance by not challenging the victim's identification of him and not calling any witnesses; (2) there was insufficient evidence that he was the assailant; and (3) there was cumulative error. We reject these claims and affirm.

I.
FACTUAL AND PROCEDURAL
BACKGROUND

On November 10, 2012, the victim went to a Ukiah bar after work. As he was drinking a beer, he noticed a woman, whom he later identified as Perkins's wife, dancing by herself. She asked him to dance, and after dancing they drank more beer together. He estimated that he drank six beers while at the bar.

Perkins's wife eventually asked the victim if he wanted to go somewhere else, and he agreed. In his initial statement to the police, the victim said that they left around 1:30

a.m. In a later statement, he estimated that it was around 1:30 a.m. when he first danced with Perkins's wife, not when they left the bar.

Perkins's wife first drove the victim to a Motel 6. They requested a room, but there were no vacancies. They then drove to a Regency Inn, where rooms were available. Perkins's wife showed her identification and registered for a room, and the victim paid in cash. The motel's records confirmed that Perkins's wife registered for the room at sometime between 2 p.m. on November 10:00 and 11:00 a.m. on November 11, but the hard-copy receipt, which would have shown the actual check-in time, was never located.

When the victim and Perkins's wife reached the room, they "went straight over to the bed" and undressed. Almost immediately after the two had gotten in bed, someone knocked on the door. The victim put on his clothes, and Perkins's wife went to the window and looked outside. It seemed to the victim like she recognized the person outside, as she "immediately opened the door." The victim testified that a man, whom he later identified as Perkins, entered the room, grabbed the victim by the throat, and threw him to the floor. Perkins choked the victim with one hand while repeatedly punching him in the face "very hard" with the other hand. The victim testified that he lost consciousness and the next thing he could remember was walking outside with his face swollen and his mouth bleeding.

The victim testified that he did not immediately report the incident to the police because he was not a legal resident and did not "know what the laws are in this country." Approximately ten days later, after he continued to experience a great deal of pain in his mouth, he sought treatment at a Ukiah clinic. He was diagnosed with a broken jaw, and he eventually received surgery to place screws in his mouth. Medical personnel encouraged him to report the assault to the police, and he did so about a month after the assault had occurred.

Soon after the victim reported the assault, the police showed him a photographic lineup that included Perkins's photograph. The victim picked out that photograph, stating that he thought Perkins was the man who had assaulted him but was not "100 percent certain." The victim indicated that he thought he would be able to identify his assailant if

he saw him in person. The victim also identified Perkins's wife in another photographic lineup.

A few days later, the police responded to a dispute between Perkins and his wife. The victim was asked to come to the scene for an in-field showup to see if he could identify Perkins. The victim viewed Perkins and told the officer he "was 70 percent positive" that Perkins was the man who had attacked him.

At some point after the victim identified Perkins during the in-field showup, the victim obtained the police report and learned Perkins's name. The victim then performed an Internet search and found a Facebook photograph of Perkins. The victim reported to the police that he was now completely sure that Perkins was his assailant, explaining that Perkins had a different hairstyle in both lineups than he did at the time of the assault and in the Facebook photograph. Finally, the victim identified Perkins at trial as the assailant, again stating that he was "100 percent" sure.

The parties stipulated that at the time of the assault, Perkins was on parole and was being monitored by GPS. An employee of a company that provides GPS monitoring for the Department of Corrections and Rehabilitation testified to Perkins's movements during the time in question. The GPS data tended to suggest that Perkins was at the bar, where he worked as a bouncer, from approximately 11:50 p.m. to 2:20 a.m. Perkins arrived at the Regency Inn around 2:35 a.m., left the motel about five minutes later, and eventually returned to the motel around 3:05 a.m. and stayed there until almost 11:00 a.m.

The jury found Perkins guilty of a felony count of assault with force likely to produce great bodily injury and found true the allegation that he inflicted great bodily injury during the offense.¹ The trial court found that Perkins had suffered a prior strike, and it sentenced him to a total term of 16 years in prison, comprised of terms of four years for the assault, doubled because of the strike, three years for the great-bodily-injury

¹ Perkins was convicted under Penal Code section 245, subdivision (a)(4), and the great-bodily-injury allegation was found true under Penal Code section 12022.7, subdivision (a).

allegation, and five years for the previous serious felony under Penal Code section 667, subdivision (a).

II. DISCUSSION

A. *Perkins Fails to Demonstrate Ineffective Assistance of Counsel.*

Perkins claims that his trial counsel rendered ineffective assistance by failing to challenge the victim's identification and not calling certain witnesses to testify for the defense. We are not persuaded.

We begin by discussing the law governing claims of ineffective assistance of counsel that are raised in a direct appeal. The federal and state Constitutions guarantee criminal defendants the right to effective representation by counsel. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15; *People v. Mai* (2013) 57 Cal.4th 986, 1009.) To prevail on a claim of ineffective assistance, “the defendant must first show counsel’s performance was deficient, in that it fell below an objective standard of reasonableness under prevailing professional norms. Second, the defendant must show resulting prejudice, i.e., a reasonable probability that, but for counsel’s deficient performance, the outcome of the proceeding would have been different. When examining an ineffective assistance claim, a reviewing court defers to counsel’s reasonable tactical decisions, and there is a presumption counsel acted within the wide range of reasonable professional assistance.”² (*Mai*, at p. 1009.)

“Because the presumption of counsel’s competence can typically be rebutted only with evidence outside the record, ineffective assistance claims are normally raised in habeas corpus proceedings where such evidence can be presented.” (*People v. Arce* (2014) 226 Cal.App.4th 924, 930.) When a claim of ineffective assistance is raised in a direct appeal, reversal is warranted “only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked

² Perkins argues that the appropriate standard of review for the prejudice prong is whether counsel’s performance was harmless beyond a reasonable doubt under *Chapman v. California* (1966) 386 U.S. 18. He provides no authority for this position, and we therefore do not consider it.

for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation.” (*People v. Mai, supra*, 57 Cal.4th at p. 1009.)

1. The failure to seek to exclude the victim’s identification of Perkins did not constitute ineffective assistance of counsel.

Perkins contends that his trial counsel rendered ineffective assistance because she did not file a motion to exclude the victim’s identification. We disagree.

As Perkins recognizes, the success of this claim depends on whether he can show that a motion to exclude the identification evidence would have been granted. (See *People v. Reynolds* (2010) 181 Cal.App.4th 1402, 1409 [“trial counsel is not required to make frivolous or futile motions, or indulge in idle acts”].) To determine whether a defendant’s right to due process requires the exclusion of identification evidence, we ask “ ‘ (1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification itself was nevertheless reliable under the circumstances.’ ” (*People v. Clark* (2016) 63 Cal.4th 522, 556.) The defendant has the burden of proving that an identification procedure was unreliable. (*People v. Cunningham* (2001) 25 Cal.4th 926, 990.)

Perkins does not challenge any aspect of the initial photographic lineup, during which the victim pointed at Perkins’s photograph but stated he would be more sure of Perkins’s identity if he could see Perkins in person. Nor does Perkins argue that there was anything impermissible about the in-field showup, at which the victim stated that he was 70 percent sure that Perkins was his assailant. Instead, Perkins claims that “[s]upplying the victim with [the] suspect[’]s name prior to a proper identification . . . [was] ‘unduly suggestive’ and certainly helped Perkins to ‘stand out.’ ”

We fail to see how the victim’s use of Perkins’s name to find a Facebook photograph of Perkins constituted an unduly suggestive identification procedure. Due process is not offended by the admission of identification evidence unless “the identification was . . . procured under unnecessarily suggestive circumstances *arranged by law enforcement*.” (*Perry v. New Hampshire* (2012) 132 S.Ct. 716, 720, 730, italics added.) Here, even if the police were responsible for providing the victim with Perkins’s

name, there is no evidence that the police suggested to the victim that he look up Perkins online or that the victim's discovery of the Facebook photograph was prompted by anything other than his own initiative.

"When no improper law enforcement activity is involved, . . . it suffices to test reliability [of an identification] through the rights and opportunities generally designed for that purpose," including "vigorous cross-examination" and "jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt." (*Perry v. New Hampshire*, *supra*, 132 S.Ct. at p. 721; see also *People v. Gordon* (1990) 50 Cal.3d 1223, 1243.) Perkins's trial counsel cross-examined the victim on his identification of Perkins, and she argued at length during closing argument that the identification was unreliable. In addition, the jury was instructed on reasonable doubt and factors it should consider in evaluating identification evidence. In sum, due process did not require the exclusion of the victim's identification of Perkins, and Perkins's trial counsel therefore did not render ineffective assistance by not moving to exclude that evidence.

2. Counsel did not render ineffective assistance by not calling any witnesses.

Perkins also claims that his trial counsel rendered ineffective assistance by failing to call any witnesses at trial, identifying two in particular that counsel had earlier mentioned as possibilities. Again, we are not persuaded.

Before trial, Perkins's trial counsel indicated that she intended to call two witnesses, a police officer who ultimately testified for the prosecution and another witness, D.R., who apparently was present when the in-field showup occurred. Counsel told the trial court that she did not intend to call Perkins's wife, stating, "I really think that she is kind of -- she's interesting. And we interviewed her. I think the D.A. would find her interesting as well and she doesn't help, nor really hurt. I'm concerned she's got a mental health issue. She's been through the system before and I think she's . . . not going to be a witness I would be inclined to call." Neither D.R. nor Perkins's wife ultimately testified.

Perkins argues that his trial counsel rendered ineffective assistance by failing to call either D.R. or Perkins's wife to testify, but he fails to meet either element of an ineffective assistance claim. He has not demonstrated that counsel failed to interview D.R. or incorrectly assessed D.R.'s significance as a witness. Nor does he explain why the explanation counsel gave for not calling his wife as a witness was unreasonable. Finally, he has not even hinted at what D.R.'s or his wife's testimony would have actually been. As a result, Perkins has failed to demonstrate any deficient performance or resulting prejudice. (See *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1093.)

B. There Was Substantial Evidence that Perkins Was the Assailant.

Perkins next argues that his conviction must be reversed because there was insufficient evidence that he was the assailant. To evaluate this claim, “ ‘we review the whole record to determine whether . . . [there is] substantial evidence to support the verdict . . . such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. . . . In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence.’ ” (*People v. Manibusan* (2013) 58 Cal.4th 40, 87.)

According to Perkins, “the only evidence presented” to establish that he was the assailant “was the tainted identification and the GPS results.” We have already rejected the argument that the victim's identification was inadmissible, and the identification alone constituted substantial evidence that Perkins was the assailant. Moreover, contrary to Perkins's position otherwise, any discrepancy between the victim's estimated timeline and the GPS evidence did not prevent the jury from finding beyond a reasonable doubt that Perkins was at the Regency Inn when the assault occurred. The victim acknowledged that he was intoxicated and that his statements about the times he and Perkins's wife left the bar and arrived at the motel were only estimates. Therefore, the jury could reasonably infer that the assault took place later than he remembered, at a time when Perkins was at the motel. There was substantial evidence to support the conviction.

C. No Cumulative Error Appears.

Finally, Perkins contends that his conviction must be reversed because of the cumulative effect of the errors he identifies. We disagree that any errors occurred, and this claim therefore fails.

III.
DISPOSITION

The judgment is affirmed.

Humes, P.J.

We concur:

Margulies, J.

Dondero, J.